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No. 00-196

In the Supreme Court of the United States

CENTURY IMPORTERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the statute permitting the correction of mistakes of fact after liquidation of customs duties, 19 U.S.C. 1520(c), is not applicable to this case, or whether, as alleged by petitioner, the court held that Section 1520(c) precluded the importer from raising issues of law and related facts subsequent to entry of the merchandise.

2. Whether the court of appeals correctly held that the Customs Service, in determining the value of imported merchandise for purposes of assessing *ad valorem* duties, properly calculated the "transaction value" of the merchandise on the basis of the price actually paid or payable by the buyer to the seller of the merchandise, rather than on the basis of the net profit remaining to the seller, determined by deducting a post-importation rebate of duties from the seller to the buyer from the price paid by the buyer.

3. Whether the court of appeals correctly held that the Customs Service, in assessing the transaction value of the imported merchandise, properly determined not to deduct import duties from the price actually paid by the buyer to the seller in light of the fact that import duties were not a component of that price and, therefore, were not separately identified to Customs at entry.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 205 F.3d 1308. The opinion of the United States Court of International Trade (CIT) (Pet App. 21a-30a) is reported at 19 F. Supp. 2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. A petition for rehearing was denied on May 10, 2000 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on August 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Century Importers, Inc., filed an action in the CIT seeking a refund of import duties, based upon its claim that the Customs Service (Customs) had incorrectly appraised its merchandise under the "transaction value" statute, 19 U.S.C. 1401a(b). Pursuant to Section 1401a(b)(1), the transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States (plus certain amounts not relevant to this action). Pet. App. 5a-6a. The term, "price actually paid or payable" is defined in Section 1401a(b)(4), in relevant part, as "the total payment * * * made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller."

2. The imported merchandise at issue here consisted of beer imported by petitioner, on behalf of Miller Brewing Company (Miller). Miller had purchased the beer from the seller/exporter, Molson Breweries (Molson) of Toronto, Canada, at a price which was termed the "transfer price." Pet. App. 2a. The "transfer price," also characterized as the "invoice price," was the price listed on the entry papers by the importer as the price actually paid by the buyer (Miller) to the seller (Molson). Customs appraised the merchandise on the basis of the "invoiced transfer price" because that was the price actually paid by the buyer to the seller. As indicated in petitioner's Complaint filed in this action,[1] and admitted by petitioner,[2] that "transfer

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[1] Complaint ¶ 13; Confidential Joint Appendix Before the Court of Appeals (Conf. C.A. App.) 30-31.

[2] Defendant's Statement of Material Facts Not in Issue, attached to its Cross-Motion for Summary Judgment ¶ 9 ("deemed

price" did not include any component for import duties. Import duties were paid by petitioner to Customs, separate and apart from the price actually paid by the buyer (Miller) to the seller (Molson) for the beer. Subsequent to importation, the seller (Molson) reimbursed the buyer (Miller) for the additional duties the buyer had paid to Customs.[3]

3. Petitioner's claim in this case was based upon its contention that, because the seller reimbursed the duties to the buyer subsequent to importation, and therefore the profit remaining to the seller was reduced from the actual price paid, the amount of duties should have been deducted from the transaction value pursuant to 19 U.S.C. 1401a(b)(3), which states that transaction value does not include duties if identified separately from the price actually paid or payable. The government maintained that no duties could be deducted from the price actually paid by the buyer to the seller because no duties had been included in that price. The government also argued that, even if duties had been included in the transfer price, they were not "separately identified" at entry from the invoice price, as required by statute, and therefore still could not be deducted.

Additionally, the government argued in the alternative that, even if duties had been included in the

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admitted" by petitioner); Conf. C.A. App. 56; Deposition of Plaintiff, by Ann Zegarchuk, Plaintiff's Designated Representative (agent) 70-72; Conf. C.A. App. 431-433.

[3] Using figures relating to one of the entries in this case, as an example, the "transfer/invoice price" paid by Miller to Molson for the beer was $4,208, and Customs correctly determined that the transaction value of the merchandise was $4,208. The 50% duties ($2,104) were paid in addition to the $4,208 price, and that additional amount of $2,104 was later reimbursed to Miller by Molson.

transfer price, they would properly be disregarded in calculating transaction value, by virtue of 19 U.S.C. 1401a(b)(4)(B), which provides that "[a]ny rebate of, or other decrease in, the price actually paid or payable that is made or otherwise effected between the buyer and seller after the date of the importation * * * shall be disregarded in determining the transaction value."

4. The parties cross-moved for summary judgment in the CIT. The court granted summary judgment to petitioner, holding that import duties should have been deducted by Customs from the "transfer price" of the merchandise in calculating "transaction value." Pet. App. 21a-30a. The CIT acknowledged that the price actually paid by the buyer to the seller (the transfer price) would remain the same for the buyer, regardless of the duties paid to Customs in addition to that price. However, the court held, because the seller reimbursed the buyer for the duties, and this reimbursement resulted in a lesser price ultimately received by the seller, the transaction was a "'duty paid' price transaction." *Id.* at 22a. The court concluded, therefore, that Customs erred in not deducting the duties from the transfer price in calculating the value of the merchandise. The court recognized that it was undisputed that, at the time of entry, the invoice price did not separately identify duties. *Id.* at 24a. It determined, nonetheless, that petitioner's failure to separately identify the duties from the price paid or payable at entry did not defeat its claim because it was merely an inadvertence or mistake of fact. The CIT indicated that, since a "mistake of fact" would be correctable under 19 U.S.C. 1520(c)(1), which provides, in essence, for corrections of a clerical error or mistake of fact in an action in which a timely protest is not filed, the error here should also be

correctable. Pet. App. 25a.[4] The court also concluded that the reimbursement of duties, subsequent to importation, was not a rebate or reduction in price within the meaning of Section 1401a(b)(4)(B). *Id.* at 23a.

5. The court of appeals reversed, with one judge dissenting. Pet. 1a-18a. The court of appeals held that, in accordance with Section 1401a(b)(1), transaction value should properly be based upon the price paid or payable by the buyer to the seller, and that Customs, in calculating transaction value, is not required to discern a difference between the fixed sum actually paid by the buyer, and the variable sum that is received by the seller as a result of any reimbursement made by the seller to the buyer. *Id.* at 8a. The court of appeals held that CIT erred in finding that the "invoice transfer price" was a duty-paid price, *i.e.*, that the price included duties. *Ibid.* The appellate court also held that, because the statutory formula set forth in Section 1401a(b)(3) prescribes that duties may be deducted from transaction value if separately identified, Customs was not authorized to deduct them here, because the importer failed to separately identify any duties from the price actually paid (the transfer price). *Id.* at. 7a. The court of appeals further ruled that the CIT erred in reading Section 1520 as giving the importer a year to correct its failure to identify the "duty paid" invoice at the time of entry, because Section 1520 does not apply to this case. *Id.* at 9a. The appellate court additionally

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[4] Thus, although the action here was not brought pursuant to Section 1520(c), because a timely protest was filed, the CIT justified the importer's failure to separately identify duties by finding that deficiency was a "mistake of fact," and then analogized it to a mistake of fact which would be correctable under Section 1520(c).

held that, because the post-importation reimbursement of duties was in fact a rebate, Customs was required to disregard the payment in determining the price actually paid in accordance with Section 1401a(b)(4)(B). *Id.* at 7a.[5]

ARGUMENT

1. Petitioner mischaracterizes the appellate court's decision as holding that 19 U.S.C. 1520(c) limits the rights of an importer to obtain *de novo* judicial review in an action brought pursuant to 19 U.S.C. 1514(a). Pet. 16, 24. Contrary to petitioner's argument, the Federal Circuit did not hold that an importer's error at entry may be remedied only under Section 1520(c) rather than Section 1514 (Pet. 20, 24), or that an importer is precluded from raising new facts or legal issues in a judicial proceeding brought pursuant to Section 1514 (Pet. 16). It is abundantly clear that petitioner did obtain *de novo* review in the CIT under Section 1514(a), and the Federal Circuit explicitly held that Section 1520(c) is not even applicable to this action. Pet. App. 9a. Thus, the central issue raised by petitioner here is simply a "non-issue," and there is no reason for this Court to grant the petition for a writ of certiorari.

The Federal Circuit's decision, in actuality, involves a careful and legally sufficient analysis of the transaction value statute, 19 U.S.C. 1401a(b), in light of petitioner's

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[5] Judge Newman dissented. Pet. App. 13a-17a. Contrary to the majority, she concluded that Section 1520 applies to this case and that the importer should have been permitted to advise Customs that the invoice price included duties, notwithstanding its failure to separately identify the duties at entry. *Id.* at 14a-15a. Judge Newman also concluded that Section 1401a(b)(4)(B) does not apply to this case because the seller's agreement to reimburse the duty after importation was not a "rebate." *Id.* at 16a-17a.

claim that, in appraising its merchandise, Customs should have deducted a post-importation rebate of duties from the price the buyer had actually paid the seller, pursuant to Section 1401a(b)(3)(B). The court of appeals correctly held that, pursuant to the proper legal interpretation of various sections of the transaction value statute, Customs accurately calculated the transaction value of the imported merchandise based upon the undisputed facts of this case. That holding does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

2. The Federal Circuit's holding that Customs properly calculated the transaction value of the imported merchandise is based primarily upon its correct textual analysis of Sections 1401a(b)(1) and (4)(A), and their application to the facts of this case. Pet. App. 5a-7a. The appellate court correctly held that, in accordance with the plain language of the pertinent provisions, transaction value is based upon the total payment made or to be made by the buyer to the seller of the merchandise, and "Section 1401a(b)(4)(B) directs Customs to disregard rebates after the date of importation." *Id.* at 7a. In this case, it was undisputed that the total price actually paid by the buyer to the seller (the "invoiced transfer price"), which was the price properly used by Customs to appraise the merchandise, did not include any component for duties. Inasmuch as the transfer price did not include any component for duties, the Federal Circuit correctly held that the CIT erred in finding that the transfer price was a "duty-paid price." *Id.* at 8a.

The Federal Circuit's conclusion is supported by the record, which clearly indicates that the duties paid by the importer were in addition to the transfer price; not

a component of the transfer price.[6] Petitioner argued, however, that because the seller reimbursed the buyer for additional duties subsequent to importation, and the seller was therefore left with less profit, the transaction was, in effect, a "duty-paid" transaction. Pet. 12.; Pet. App 3a-4a. The appellate court correctly held that the CIT erred by examining the transaction from the seller's perspective after importation and payment of a rebate, whereas the statute requires Customs to calculate the value of merchandise on the basis of the price paid by the buyer, and not on the basis of the sum ultimately received by the seller after a post-importation rebate. *Id.* at 7a-8a. Although petitioner apparently argues that the Federal Circuit's discussion of Section 1520(c), in a later portion of the decision, prevented the importer from raising legal claims in the court after the date of entry and administrative review (Pet. 16), that discussion of Section 1520(c) had no material bearing on the Federal Circuit's holding that Customs correctly calculated the transaction value of the importer's merchandise by appraising the merchandise on the basis of the price actually paid by the buyer to the seller, as required by Sections 1401a(b)(1) and (4)(A).

3. As indicated by the Federal Circuit, the importer argued that because the seller had, in reality, reduced the price of its merchandise by agreeing to reimburse the buyer for duties after importation, such reimbursement should be deducted in determining transaction value. Pet. App. 4a. See also Pet. 12. As correctly

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[6] Complaint ¶ 13; Conf. C.A. App. 30-31; Defendant's Statement of Material Facts Not in Issue, attached to its Cross-Motion for Summary Judgment ¶¶ 9, 10 ("deemed admitted" by petitioner); Conf. C.A. App. 56; Deposition of Plaintiff by Is Representative (agent) Zegarchuk 41; Conf. C.A. App. 402.

stated by the appellate court, however, Section 1401a(b)(4)(B) states that a post-importation rebate or reduction in the price actually paid shall be disregarded in determining the transaction value. Pet. App. 6a. Inasmuch as it is undisputed that the reimbursement here was made subsequent to importation, Section 1401a(b)(4)(B) confirms that Customs correctly disregarded any post-importation rebate in determining transaction value. That conclusion is also supported by the reasoning of two prior analogous decisions of the CIT, *Esprit de Corp* v. *United States*, 817 F. Supp. 975 (1993), and *Allied International* v. *United States*, 795 F. Supp. 449, 453 (1992), which held that reimbursements made or effected subsequent to entry should be disregarded in determining transaction value, by virtue of Section 1401a(b)(4)(B).

4. The Federal Circuit further supported its conclusion by reference to the plain language of Section 1401a(b)(3). Under Section 1401a(b)(3), even if we assume duties had been included in the total price actually paid by the buyer to the seller, a statutory prerequisite for deducting those duties from the transaction price is that they be "identified separately" from the total price paid or payable by the buyer. It is undisputed that the importer here did not separately identify any duties from the price paid or payable by the buyer to the seller. Pet. App. 7a. The court of appeals therefore correctly held that, under a straightforward application of the statute to this case, Customs had no authorization to deduct duties not separately identified, and hence Customs properly appraised the merchandise at the invoiced unit price. *Ibid.*

Although unnecessary to its actual holding, the Federal Circuit then addressed comments by the CIT, the dissenting judge, and petitioner, which erroneously

applied Section 1520(c) to the facts of this case. Contrary to petitioner's claim that the appellate court held that Section 1520(c) limited the rights of the importer, the court of appeals actually held that Section 1520(c) "does not apply to this case," inasmuch as the importer's failure to satisfy the statutory requirements of the transaction value provisions is not the type of error that is remediable under Section 1520(c). Pet. App. 9a.

The discussion of Section 1520(c) arose from the government's secondary argument in the CIT that, even if we assume the price actually paid by the buyer to the seller included duties (which it did not), the duties would not have been properly deductible from the price paid by the buyer, as claimed by the importer, because they were not separately identified to Customs at entry, as required by Section 1401a(b)(3). The government pointed out that the requirement that the importer must advise Customs at the point of entry of any duties included in the invoice price was supported by the reasoning of the Federal Circuit in *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 380 (1990), and *Moss Manufacturing Co.* v. *United States*, 896 F.2d 535, 539 (1990), which indicated that, in appraising merchandise, Customs was not expected to engage in extensive fact-finding at the administrative level to discern whether a price provided to it as the basis of transaction value actually includes duties and/or other costs which, by statute, must be separately identified by the importer.

The CIT, rather than comprehensively addressing the government's primary argument that the transfer price did not include any duties that could be deducted from the actual value of the imported goods, focused instead on the government's alternative argument that, in any event, duties could not be deducted because they

were not separately identified at entry. The CIT then analogized the importer's failure to separately identify the duties on the entry papers to a "mistake of fact," which would be correctable under Section 1520(c) in a situation in which no protest had been timely filed. Pet. App. 24a-25a.

The dissenting judge in the court of appeals apparently misapprehended the CIT's opinion as holding that the error here was the type of error correctable under Section 1520(c), and mistakenly indicated that petitioner should be allowed to correct the error, pursuant to that statute. As now acknowledged by petitioner, this action was not brought pursuant to Section 1520(c) and cannot be corrected pursuant to that provision. Pet. 16, 17, 21, 22. At the appellate level, however, petitioner attempted to rely upon Section 1520(c). Contrary to petitioner's statement to this Court that neither party raised nor briefed issues involving Section 1520(c) (Pet. 24), petitioner itself did brief the issue in its "appellee brief" (at 38-42), in which it attempted to utilize the CIT's reasoning relating to Section 1520(c) as justification for its failure to separately identify duties at entry. Petitioner erroneously contended in its brief before the court of appeals that no statute requires that Customs be informed of the duty-paid nature of a transaction at entry, and specifically stated that "the CIT pointed out correctly that such a conclusion would fly in the face of 19 U.S.C. § 1520."[7] In response to the various references to Section 1520(c), the majority in the Federal Circuit analyzed the statute, and correctly and expressly held that Section 1520(c) does not apply to this case. Pet. App. 9a.

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[7] Appellee Br. 41.

Accordingly, as the court of appeals held, Customs properly calculated the transaction value of the imported merchandise and the importer, therefore, is not entitled to its claimed post-importation refund of duty. Nor does the decision of the court of appeals that Section 1520(c) has no application here implicate any conflict between Sections 1514(a) and 1520(c), as contended by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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